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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, WARDEN, *Petitioner*,

v.

STEVEN H. CASWELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether federal Due Process requires, on federal collateral review of state instructional errors related to an element of a criminal offense, that the prosecution meet a higher standard for harmlessness akin to that urged by the concurring opinion in *Carella v. California*, 491 U.S. 376, 105 L.Ed.2d 218, 109 S.Ct. 2419 (1989), rather than the "substantial and injurious effect" standard dictated by *Brecht v. Abrahamson*, 507 U.S. 619, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993). The same issue is pending in the petition for writ of certiorari filed in *People of the State of California v. Kenneth Duane Roy*, No. 95-2025, filed June 17, 1996.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No.

ARTHUR CALDERON, WARDEN, *Petitioner*,

v.

STEVEN H. CASWELL, *Respondent*.

OPINION BELOW

Petitioner respectfully petitions for a writ of certiorari to review the August 14, 1996 decision of the United States Court of Appeals for the Ninth Circuit granting a rehearing and reversing the denial of a petition for writ of habeas corpus challenging respondent's multiple convictions for kidnapping for robbery, robbery, assault with a deadly weapon, and attempted murder. App. A, Case No. 93-16146. The opinion and dissent is unpublished but relies upon the en banc decision of the Ninth Circuit in *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996) (en banc). A petition for writ of certiorari to the Ninth Circuit is similarly pending in the *Roy* case, *People of the State of California and Daniel Lungren v. Kenneth Duane Roy*, No. 95-2025, filed June 17, 1996.

The original panel decision of Ninth Circuit Court of Appeals, unpublished, which affirmed the district court, with one dissent, issued on June 14, 1995, and is provided as Appendix B. The orders of the district court are similarly unpublished. The district

court's order granting respondent's motion for summary judgment on the claim at issue was granted on March 31, 1993, Case No. CIV S-91-1079 WBS. App. C. The order was reentered on April 8, 1993, following further de novo review with respondent's belated objections to findings. App. D. The order further was based upon the findings and recommendation of the magistrate judge. App. E. An order directing judgment issued on May 28, 1993, and on June 14, 1993, following a timely notice of appeal, the district court issued a certificate of probable cause to appeal. App. F. The state court's order denying a petition for writ of habeas corpus is unpublished and is represented by an order of denial by the California Supreme Court on August 15, 1990, in Case No. S015004. App. G. The disposition of the State Court of Appeal, also unpublished, is contained in an opinion filed on January 23, 1978, in Case No. 3 Crim. 8988, *People of the State of California v. David Alan Englund and Steven Haynes Caswell.* App. H.

JURISDICTION

The Court of Appeals for the Ninth Circuit issued its opinion on rehearing on August 14, 1996. App. A. The Ninth Circuit has issued a stay of its mandate until October 28, 1996. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clauses of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution (App. I); California Penal Code sections 31, 187, 207, 209, 211, 245, 666 (App. J); California Jury Instructions, Criminal (CALJIC), as given at respondent's trial, Nos. 3.00 (1976 Revision), 3.01 (1974 Revision), 4.21, 9.23 (1973 Revision) (App. K).

STATEMENT OF THE CASE

Respondent Steven Caswell challenges his multiple convictions, along with trial codefendant David Englund, for robbery, kidnap for robbery, assault with a deadly weapon, and attempted murder of each of four University of California students camping at the Antler's Campground in Shasta County, California, on May 20, 1976. App. H. The jury in respondent's trial was instructed on the liability of aiders and abettors under California law as defined in California Jury Instructions, Criminal (CALJIC), Nos. 3.00 and 3.01. App. K. Under that instruction, the "person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator, he aids, promotes, encourages or instigates by act or advice the commission of the crime." CALJIC 3.01 (1974 Revision) (App. K). Moreover, the aider and abettor "is also liable as a principal for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged." CALJIC No. 3.00 (1976 Revision) (App. K). Following state affirmance of the convictions on January 23, 1978, the California Supreme Court decided *People v. Beeman*, 35 Cal.3d 547, 199 Cal.Rptr. 60, 674 P.2d 1318 (1984) and held that the aiding and

abetting instructions such as given in respondent's trial were inadequate unless the instructions also informed the jury that there must be an intent to facilitate the criminal offense(s) aided. *Beeman, supra,* at 560.[1] The modification of this instruction, however, was prospective and did not apply to cases not pending on appeal at the time *Beeman* was announced. *People v. Croy*, 41 Cal.3d 1, 12, 221 Cal.Rptr. 592, 598, 710 P.2d 392, 398 (1985). Respondent, nevertheless, in 1990, filed a petition for writ of habeas corpus raising the omission with the California Supreme Court. That Court summarily denied the petition on August 19, 1990, in Case No. S015004. The claim was exhausted and the federal habeas corpus proceedings followed. Respondent contends that the instruction given in his case violated the due process clause by omitting proof beyond a reasonable doubt of an element of the offense. Petitioner Warden has maintained that the instruction actually given amounted to harmless error at best. The federal magistrate judge found the error harmless. App. E. The district court following de novo review agreed. App. D. The original Ninth Circuit panel agreed with one judge dissenting. App. B. On rehearing, the majority reversed with two judges declining to find harmless error under the authority of *Roy v. Gomez, supra*, 81 F.3d 863 (9th Cir. 1996) (en banc).

> "A. And then Mr. Englund [codefendant] said, 'Okay, let's just gag them.' Mr. Caswell [respondent] said, 'No, Let's shoot them.' And

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1. *Beeman* subsequently was criticized by *People v. Dyer*, 45 Cal.3d 26, 246 Cal.Rptr. 209, 753 P.2d 1 (1988), *cert. den. sub nom. Dyer v. California*, 488 U.S. 934, 102 L.Ed.2d 347, 109 S.Ct. 330, which held that *Beeman* error is not reversible per se, but only on direct appeal is subject to a *Chapman* beyond-a-reasonable-doubt harmless error analysis. See *Chapman* at 24.

> I remember this conversation very distinctly, Mr. Englund who had the gun said, 'No, gag them.' And Caswell said, 'Shoot them.' And so he said, 'Okay.'" RT 49, lines 5-10.

This testimony from Eanswythe Leicester echoed by Jeremy Grainger (RT 161:15-18), culminated an evening in which four University of California campers were kidnapped, robbed, assaulted, three of them were shot.

The four students - Eanswythe Leicester, Jeremy Grainger, Laura Goldman, and Jim McCabe - were driving by a campsite when respondent Caswell and his codefendant Englund flagged them down. RT 35, 105, 153, 195. Englund pulled a gun, stuck it in Jeremy's face, and ordered the students out of their vehicle. RT 36, 106, 153, 195. Caswell told Laura Goldman that Englund had a hole in his leg and that she had better do as he said. RT 197.

The assailants demanded and obtained money. RT 39, 108, 155. Caswell took Jim McCabe to the vehicle where the latter took money from the glove compartment and gave it to Caswell. Englund began to strike Jeremy and Jim about the head with the gun. RT 40, 113, 156, 198. The students were ultimately abducted to some cliffs where they were forced to disrobe and lie down. RT 46, 111, 158-159, 200. Caswell bound two tightly with rope and when one complained, Caswell pulled it tighter. RT 201-202. Another was tied to them by a T-shirt at the feet. RT 159. Apparently lacking sufficient rope, Caswell grabbed Jim McCabe from behind and pushed him over the cliff edge where he landed on a bunch of jutting rocks. RT 48, 114. While Caswell earlier opposed shooting them, he obviously changed his mind and told Englund to shoot them rather than gag them as earlier recited. RT 49, 161. Englund then shot Laura Goldman

in the stomach and Jeremy Grainger in the chest. RT 49, 161, 203. He hit Leicester in the head with the gun and then fired twice as she held her hands against her head. One bullet struck her after which she let her head fall back and hands fall down. RT 51-53. She heard the assailants drive off in the victim's vehicle. RT 53. Respondent did not testify at trial and did not otherwise contest his mental state.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ninth Circuit opinion in applying harmless error under *Roy v. Gomez, supra*, 81 F.3d 863 (9th Cir. 1996) (en banc) and *Carella v. California, supra*, 491 U.S. 376, 106 S.Ct. 2049, 105 L.Ed.2d 218 (1989) ("*Carella*"), conflicts with decisions of the First and Seventh Circuits, see *Cuevas v. Washington*, 36 F.3d 612, 620 at n. 17 (7th Cir. 1994) and *Libby v. Duvall*, 19 F.3d 733 (1st Cir. 1994). In addition, the Ninth Circuit opinion rejects the standard for harmless error set forth by this Court for collateral review of state judgments in *Brecht v. Abrahamson, supra*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) ("*Brecht*") and applied in *O'Neal v. McAninch*, ___ U.S. ___, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) ("*O'Neal*"), by requiring that *Carella* be satisfied in order to avoid the grave doubt described by *O'Neal*. The result will have a serious impact in the review of state court judgments where there has been some instructional error in the description of an element of the offense.

ARGUMENT

I.

THE NINTH CIRCUIT OPINION IMPROPERLY IMPOSES THE *CARELLA* STANDARD ON DIRECT REVIEW UPON THE *BRECHT* STANDARD FOR REVIEW ON FEDERAL HABEAS CORPUS AND THEREBY CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

This Court has established a standard for the review of harmless error in federal habeas corpus cases. *Brecht v. Abrahamson, supra,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353; *O'Neal v. McAninch, supra,* ___ U.S. ___, 115 S.Ct. 992, 130 L.Ed.2d 947.[2] This case demonstrates the confusion in lower courts because the three judge circuit panel has twice rendered a split decision on this very issue. Some circuit court opinions, like the Ninth Circuit majority opinion in this case, have grafted onto the *Brecht* federal habeas harmless error standard the narrower method for determining prejudice on direct review of federal criminal cases defined by Justice Scalia in his concurring opinion in *Carella*. Thus, what is evolving in the circuit and district courts is a higher, hybrid-standard for a finding of harmlessness for instructional error on collateral review. This is in direct

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2. *Brecht* found harmless error in the improper use of an accused's post-*Miranda* silence for impeachment. *See Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). *O'Neal* dealt with the effect of "possible jury 'confusion' arising out of a trial court instruction about the state of mind necessary for conviction combined with a related statement by a prosecutor." *Brecht, supra,* at 622-623; *O'Neal, supra,* at 994.

contradiction of this Court's mandates in *Brecht* and *O'Neal*.

As the dissenting judge noted upon the Seventh Circuit's reversal of a grant of habeas relief in *Cuevas v. Washington, supra*: This "approach may well result in a determination of harmless error in substantially fewer instances than the usual 'trial error' situation." *Id.* at 624 (dis. opn., Ripple, Cir. J.). Such an increase in overturning state convictions on collateral review clearly opposes this Court's intent as stated in *Brecht*, 507 U.S. at 619.

For example, in *Libby v. Duvall, supra*, 19 F.3d 753 (1st Cir. 1994), the lead, concurring and dissenting opinions of a divided three judge panel of the First Circuit urged three different standards for evaluating the prejudicial effect of instructional error. The case exemplifies why review by this Court is necessary.

Having determined that the overall jury charge did not adequately explain the element of malice, the lead opinion in *Libby* determined the error harmless under *Brecht* and rejected the habeas applicant's claim that the *Carella* concurrence method of analyzing harmless error should be applied. The lead opinion conceded that there was evidence upon which the jury "*might* conceivably have" provided a basis for the jury to have concluded the prosecution had not proven its case and that the instructional error (a conclusive presumption) tended to deter the jury from considering that evidence. Nevertheless, it found, after a review of the record evidence, that it was "extremely unlikely that the jury would have relied on the evidence and returned a verdict of manslaughter." *Libby* at 740. Thus it found the error did not have "substantial and injurious effect or influence on the jury's verdict" and found it harmless. *Id.* A concurring judge affirmed under *Brecht*, but shared the dissenting justice's belief that the "*Carella*

concurrence articulates compelling grounds for more narrowly confining 'harmless error' review of a jury instruction mandating a conclusive presumption." *Libby, supra,* at 740 (conc. opn., Cyr, Cir. J.). The dissenting judge found the conclusive presumption instruction to be prejudicial under the *Carella* framework for determining harmlessness of the instructional error because the jury was "at least reasonably likely" to have improperly found malice. *Libby, supra,* at 743, 744 (dis. opn., Stahl, Cir. J.). The approach of the majority in Caswell's case was essentially that of the *Libby* dissent.

In a split decision in *Rosa v. Peters*, 36 F.3d 625 (7th Cir. 1994), the majority of the three judge panel, in analyzing instructional error, described as an explicit misdirection of the jury, opined, as did the dissent in this case, that the error was harmless under *Brecht*. *Rosa* at 631-632. However, the dissent, like the majority here, found that "allowing the approach urged by Justice Scalia in *Carella* to survive *Brecht* is compatible with the principle of judicial restraint and federalism re-emphasized in that opinion." *Rosa* at 638, suggesting that harmless error review is intrusive (dis. opn., Ripple, Cir. J.).

Another majority of a three judge panel of the Seventh Circuit found, like the dissent in the *Roy* case, that the *Brecht* test for harmless error requires a habeas court to evaluate to some extent the probability of outcome if the case were tried under proper instructions. *See Cuevas v. Washington, supra*, 36 F.3d at 621. However, the dissenting opinion in *Cuevas* labeled instructional error a hybrid somewhere between "structural" and "trial" error, *see Arizona v. Fulminante*, 499 U.S. 279, 307, 113 L.Ed.2d 302, 111 S.Ct 1246 (1991), and argued that the beyond-a-reasonable-doubt approach of *Carella* survives *Brecht* and is the appropriate method of determining harmlessness on

federal habeas review of a state court judgment. *Cuevas, supra,* at 625 (dis. opn., Ripple, Cir. J.). This is the approach taken by the Ninth Circuit en banc majority in this case.

The confusion of the foregoing cases is reflected in cases from other circuits and on direct appeal as well. *See Peck v. United States*, 73 F.3d 1220, 1228 (2d Cir. 1995) (reversal required unless the jury actually found knowledge element despite the failure to instruct that knowledge of illegality of structuring accounts is required for intent finding). *See also United States v. Marder*, 48 F.3d 564, 573 (1st Cir. 1995) (noting two different modes of harmless error analysis exist in the circuit courts where a jury instruction misdefines or omits and element of an offense); *Kontakis v. Beyer*, 19 F.3d 110, 117-118 (3d Cir. 1994), rehg. en banc, denied (1994), *cert. den. sub nom. Kontakis v. Morton*, ___ U.S. ___, 130 L.Ed.2d 143, 115 S.Ct. 215 (1994) (no harm under *Brecht* because of the overwhelming evidence that shooting was a purposeful act even given possibility the jury instruction may have kept the jury from considering mental disease and defect evidence). The court should grant certiorari to resolve these significant conflicts in applying *Brecht*.

II.

THE MAJORITY OPINION MISAPPLIES *BRECHT V. ABRAHAMSON*, 507 U.S. 619, 113 S.CT. 1710, 123 L.ED.2D 353 (1993)

"The principle that collateral review is different from direct review resounds through our habeas corpus jurisprudence." *Brecht, supra,* 507 U.S. 619, 633, 113 S.Ct. 1710, 1719, 123 L.Ed.2d 353. The Ninth Circuit did not hear this echo. Instead, it reached for the concurring opinion of Justice Scalia in *Carella v. California, supra,* 491 U.S. 376, 109 S.Ct. 2419, 105 L.Ed.2d 218, to require that the jury "necessarily found" the omitted element by other findings. Finding itself unable to satisfy the *Carella* standard, the court declared it must necessarily have grave doubt as to the harmlessness of the error as described in *O'Neal v. McAninch, supra,* ___ U.S. ___, 115 S.Ct. 992, 995, 130 L.Ed.2d 947 (1995). In other words, no instructional error failing to meet *Carella* will ever reach the *Brecht* standard of harmless error. A later decision of the Ninth Circuit reinforces this conclusion, for the court later described *Roy*, its en banc case controlling the disposition of this case, as a "heightened standard of harmless error review" that we employ when the trial court fails to instruct the jury on an element of the crime. *U.S.* v. *Alerta*, ___ F.3d __, 9th Cir. No. 95-10224, 1996 WL 535047 (9th Cir. (Guam)). The Ninth Circuit, then, uses the same standard on direct review culled from a collateral review case.

The standard should be different. Under *Brecht*, only if a state court trial error "had substantial and injurious effect or influence in determining the jury's verdict, will a federal court be justified in overturning the

state court judgment." *Brecht, supra,* 507 U.S. 619, 637, 113 S.Ct. 1710, 1722. This Court later clarified in *O'Neal*, that if, after "pondering all that happened," a reviewing court finds that the error itself had substantial influence or if one is left in doubt, the conviction cannot stand. *O'Neal v. McAninch, supra*, ___ U.S. ___, 115 S.Ct. 992, 995.

These principles are simply stated and lend themselves to simple application. The Ninth Circuit on the other hand blends two tests to the destruction of both.

Petitioner Warden recognizes that this Court, in footnote 9 of *Brecht*, stated: "Our holding does not foreclose the possibility that in an unusual case, a deliberate and egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant a grant of habeas relief, even if it does not substantially influence the jury's verdict." Citations omitted. 507 U.S. 619, 638, n. 9.

This note, however, should not rule the result in this case. First, it was not part of the Ninth Circuit's resolution of the issue. Second, it is neither a "deliberate and egregious error of the trial type" or one "combined with a pattern of prosecutorial misconduct." The instruction was simply given as part of California law that existed at the time. As such, it was essentially like an aiding and abetting instruction recognized by this Court in *Nye & Nissen v. United States*, 336 U.S. 613, 619, 69 S.Ct. 766, 770, 93 L.Ed. 919 (1949), which dealt with conduct in which a codefendant associated with illegal conduct, participated in it, and sought by his action to make it succeed. See *U.S. v. Branch*, 91 F.3d 699, 730 (5th Cir. 1996). While giving the instruction was certainly advertent, it was neither deliberate nor egregious in violating a right of the defendant.

Footnote 9 of *Brecht* should not apply in this circumstance.

The instruction actually given in this case dictates rejection of the claim. CALJIC Nos. 3.00 and 3.01 are contained in Appendix K. The instruction is further set forth by the magistrate judge at page 3 of the findings and recommendations, App. E, citing CT 559:

> "All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who with knowledge of the unlawful purpose of the perpetrator of the crime aid and abet in its commission or, whether present or not, who advise and encourage its commission are regarded by the law as principals in the crime thus committed and are equally guilty thereof.
>
> "One who aids and abets is not only guilty as a principal of the particular that to his knowledge his confederates are contemplating committing, but he is also liable as a principal for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged.
>
> "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime he aids, promotes, encourages or instigates by act or advice the commission of the crime."

The jury could not ignore respondent's mental state under these instructions, for they required the jury to find that respondent knew the codefendant's purpose and aided, promoted, encouraged or instigated the acts. Under the facts of this case where respondent specifically said, "Shoot them," there can be no doubt about intent. the error in omitting intent as later required by California law, did not injuriously or substantially affect

the verdict. While the majority opinion in this case refers to unspecified "conflicting evidence in the record," it is not apparent. True, respondent Caswell originally disfavored shooting the victims, RT 161, but he plainly changed his mind. That change of mind led to three victims being shot. That he exhorted codefendant Englund to shoot them was found by both the State Court of Appeal, App. H at 6, and by the district court. App. E at 8. As the dissent recites, this error was harmless by any standard of evaluation and this type of nit-picking of state convictions is another self-inflicted wound which the vulnerable relations between the state and federal courts do not need. This Court should grant certiorari to clarify and correct the misapplication of *Brecht*.

III.

THE QUESTION PRESENTED IS IMPORTANT

This case, as well as the federal circuit cases cited (see Arg. I, *ante* pp. 7-10) demonstrate the difficulty some courts and some judges have in accepting the less onerous *Brecht* standard for harmless error on collateral review. Given the trend for some to attempt to circumvent that standard as shown by these cases, the confusion will only proliferate.

The need for guidance from this Court is acute, and this case presents in a pure form a timely opportunity for this Court to address misconceptions about how the rule in *Brecht* is to be applied to instructional error on collateral review; whether *Brecht* replaces on such review the beyond-a-reasonable-doubt guidelines delineated by the concurrence in *Carella* or whether *Carella* circumscribes or supplements the *Brecht* standard; how the circuits, mainly the Ninth Circuit, compound the confusion about the *Carella* standard by misapplying it; and how *O'Neal* modifies either or both of these standards, if at all. The majority opinion in the case at hand is erroneous and contradicts the lower state and federal courts, which reviewed the record and found the error harmless. The issue addressed is undoubtedly important for it impacts every federal collateral review of error in jury trial instructions which relate to the elements of a criminal offense.

CONCLUSION

An irreconcilable conflict exists among the federal and district courts, and some state courts as well, on a basic issue of federal law. This case presents an ideal opportunity to resolve these conflicts. For all the reasons discussed above, petitioner respectfully urges this Court to grant certiorari and resolve the important issues of law presented herein.

Dated: October 10, 1996.

Respectfully submitted,

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